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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 281

STATE OF UTAH, GEORGE D. FEHR, EARL E. FEHR, JOE LYON, JR., and UNITED WESTERN MINERALS COMPANY, a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

RONALD N. BOYCE,
Assistant Attorney General of Utah
State Capitol Building
Salt Lake City, Utah
GRANT H. BAGLEY
65 South Main Street
Salt Lake City 11, Utah
Counsel for Petitioners

DENNIS McCARTHY
CLIFFORD L. ASHTON
DONALD E. SCHWINN
65 South Main Street
Salt Lake City 11, Utah
Of Counsel

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on May 10, 1962.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. A copy thereof is attached hereto. (Tr. 2a) (Appendix A, pp. 1a-7a.) No opinion was rendered by the District Court.

JURISDICTION

The judgment of the court below was dated and entered on May 10, 1962, (Tr. 4) (App. B, p 8a). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

The question presented is whether the San Juan River east of Chinle Creek in Utah to the Colorado State line was, at the time the Territory of Utah was admitted to the Union as a State (January 4, 1896), a navigable body of water within the legal meaning of that term as applied to the sovereign powers of a state over the rivers and water courses within its boundaries.

STATUTE INVOLVED

The statute involved is the following provision of the Enabling Act approved July 16, 1894 (28 Stat. 107) under which Utah was admitted into the Union: "... thereupon the proposed State of Utah shall be deemed admitted by Congress into the Union under and by virtue of this Act on an equal footing with the original States."

STATEMENT OF THE CASE

The United States brought this action in the Federal District Court of Utah against the State of Utah and its mineral lessees to quiet title to the bed of the San Juan

River east of Chinle Creek to the Colorado State Line, subject to the rights of the Navajo Indian Tribe under certain Executive Orders and the riparian rights of abutting landowners. Jurisdiction was invoked under 28 U.S.C.A. Section 1345. The State of Utah by counterclaim asserted title in itself. The interests of the individual defendants were dependent solely upon the State's title.

The parties stipulated that the United States acquired title to the bed of the River under the Treaty of Guadalupe Hidalgo (February 2, 1848), 9 Stat. 922, and that the Executive Order of May 17, 1884 (1 Kapp 876) extended the boundary of the Navajo Indian Reservation to the middle channel of the San Juan River throughout the section in controversy.

Utah claims that this section of the River was navigable and under the principle of constitutional equality of states, title passed to it upon its admission into the Union (January 4, 1896).

By stipulation of the parties, the pretrial order directed that the issue of navigability be tried first, and if determined in favor of the United States, the case was ended. If that issue were resolved in favor of the State, the boundaries of the bed and the legal effect of the Executive Order of May 17, 1884, were then to be determined.

The United States prevailed in the District Court and in the Court of Appeals.

In 1931, the United States brought an original action in this Court against the State of Utah to quiet title to the bed of the Green River, the Grand River, the Colorado River within the State of Utah, and also that portion of

the San Juan River extending westward from Chinle Creek to its confluence with the Colorado. The Master appointed by this Court found that the San Juan River west of Chinle Creek was nonnavigable. Neither party excepted to this finding. The Green, the Grand and a section of the Colorado were determined to be navigable. Part of the Colorado was held to be nonnavigable. *United States v. Utah*, 283 U.S. 64.

Topography — The San Juan River rises in the high mountains of southwest Colorado, flows into New Mexico, back into Colorado and enters Utah near the corner common to these states and Arizona (Tr. 831). Up to this point several good-sized tributaries have entered it, the largest being the Animas, the Mancos, the La Plata, the Navajo, the Piedra, the Pine and the Florida Rivers. After entering Utah, it crosses an open, level flood plain approximately fifty-five miles where Chinle Creek empties into it. A very short distance from here, it enters the San Juan Canyon through which it flows 133 miles to its junction with the Colorado. The walls of this Canyon are in some places 2,000 feet in height and practically vertical from the water's edge (Tr. 831). Many rapids occur in this sector and large boulders protrude into the water. It is this stretch of the River which was found to be nonnavigable in *United States v. Utah*.

The southeast portion of Utah through which the San Juan River flows was in 1896 practically uninhabited by white men, except for the settlements at Bluff, Montezuma Creek and the trading posts at Four Corners, Aneth and Rincon. Much of the area was unexplored. Farming, stock

raising and mining were the principal industries carried on. The scenery of this region is of an unusual nature, frequently described as fantastic in its beauty and grandeur. It is a matter of common knowledge that extensive recreational projects affecting this wonderland are now being undertaken by the Government. Important discoveries of oil, gas and other minerals have recently been made.

Channel — At the time the settlement of Bluff was established on the River 18 miles above Chinle Creek in the year 1880, the San Juan River flowed in a well defined channel, the banks of which were covered with willows and trees of many years growth (Tr. 561-2). At that time the water shed was covered with forests and vegetation. Since then, it has been denuded by cutting the timber and intensive grazing by livestock. This has taken place for the most part since Statehood. It has resulted in floods which have widened the channel and caused it to braid in some places. This condition presents no problem at all to an experienced boat operator.

The average grade of the River is approximately seven feet per mile, but there are no rapids or swift water above Chinle Creek. The bed is gravel above Aneth, tapering into fine sand as it approaches Bluff. The average depth of the water during low water periods is between two and three feet and the velocity is about five feet per second. The channel averages in width between 150 and 350 feet.

Stream Flow — The stream flow was first measured in October 1914. Daily measurements were made between that date and September 30, 1917. There was an interval from October 1, 1917 to March 20, 1927 when no measurements were made. Thereafter, through 1956 the records are com-

plete. The ganging station was located at Goodrich, a short distance below Chinle Creek.

The River is supplied from a drainage area of more than 23,000 square miles located in four different states (Tr. 322). During the first recorded water year, the discharge was 3,240,000 acre feet and the mean daily flow was 4,374 cubic feet per second. Measured by months the mean flow was; October 2400 c.f.s., November 1580 c.f.s., December 1020 c.f.s., January 1010 c.f.s., February 2330 c.f.s., March 2230 c.f.s., April 8040 c.f.s., May 9270 c.f.s., June 10,000 c.f.s., July 6490 c.f.s., August 1660 c.f.s., September 1050 c.f.s. The mean daily flow was in excess of 3,000 c.f.s., for the entire period covered by the recorded measurements. An experienced boatman, familiar with the River, testified without contradiction that boats of the type in use generally in 1896 could navigate the section of the River in controversy when the stream flow was 700 c.f.s. (Tr. 910). In the first recorded period (1914-1917) the stream flow exceeded 1,000 c.f.s. 77% of each year. If the winter months are excluded, the stream flow exceeded that volume 89% of each year. (Ex 3, 10, 12, 23).

The stream flow at Ship Rock, New Mexico, thirty miles from the Utah line, is not appreciably different from that at Goodrich. Loss from seepage and evaporation between these points apparently is compensated by the water from McElmo Creek, which enters the San Juan fifteen miles below the Utah State line.

All available evidence indicates that the stream flow was greater prior to the date of admission of Utah as a state than it was during the periods when measurements were recorded. Precipitation on the water shed has de-

creased and consumptive use of the water has increased. Approximately two hundred thousand acres of farmland in Colorado and New Mexico are irrigated from water which otherwise would come down the River. It is estimated that about sixty percent of this water returns to the channel. The bulk of the appropriations for irrigation has been made since 1896.

Notwithstanding the decrease in precipitation and the increase in consumptive use since 1896, navigability of the River at the present time was demonstrated by numerous boat trips both up and down the entire disputed sector. Wooden and aluminum boats of various sizes propelled by outboard motors and carrying men and supplies encountered no problems in either low water periods or during the early summer runoff.

Variation in stream flow has been more marked since the water shed has been denuded of forests and vegetation. This has occurred for the most part since Statehood.

Early Use — An extensive use of the River was made in connection with the placer mining industry. Gold was discovered in the bed of the River in 1893. This brought an influx of miners and prospectors from all parts of the country. The boom lasted several years and there were 200 or 300 placer claims throughout the River in Utah. Many boats were used to transport mining machinery, equipment and supplies for use in these placer mining operations. Some of these boats came down the River from Colorado and New Mexico and others were launched at Bluff where supplies and equipment were obtained. A small industry was established at Bluff where boats and barges were built for use of these prospectors.

During this early period, considerable merchandise was taken down the River on flatboats from Bluff to the trading post at Rincon near the mouth of Chinle Creek.

There was also an extensive use of the San Juan River above Chinle Creek in the course of trade between the Indians and the operators of the trading post along the River. The Indians used the boats to bring their wool, hides, blankets and other products across the River and to return with merchandise and supplies. They also used the River in gathering driftwood for fuel. Fur trappers using skiffs, canoes and other small craft came down the River from points above the State line.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Tenth Circuit is in conflict with *United States v. Utah*, 283 U.S. 64, wherein it was held that sections of the Green, the Grand and the Colorado Rivers in Utah were navigable within the contemplation of the constitution and the statute guarantying the equality of the State of Utah with the thirteen original states. The capacity of the San Juan River to contribute to the development of industry, commerce, agriculture and recreation is in all respects comparable to that of each of the above named rivers, except for a difference in stream flow, which is not of controlling significance. Likewise, the obstructions and impediments to navigation of the San Juan were present in comparable degree in each of those rivers. The character and extent of use of all these rivers at the critical point of time is virtually the same.

They traverse the same sector of the State and converge into a single river near its southern boundary.

The decision now sought to be reviewed is likewise in conflict with *United States v. Appalachian Electric Power Company*, 311 U.S. 377, involving a section of the New River in West Virginia, which this Court determined to be navigable upon the authority of *United States v. Utah, supra*, notwithstanding the findings of the two lower courts that it was nonnavigable.

It is also impossible to reconcile the decision of the Court of Appeals of the Tenth Circuit with that of the Court of Appeals for the Seventh Circuit in *Wisconsin Public Service Commission v. Federal Power Commission*, 147 F.2d 743, wherein it was held that a river was navigable within the meaning of the constitutional provisions relating to interstate commerce, notwithstanding it was incapable of being used in such commerce except to float logs to market during very limited but regular periods of spring freshets.

The decision of the Court of Appeals deprives the State of Utah of its sovereignty and ownership of a natural water course which is capable of and has actually been used by the public for transportation in connection with trade, industry and commerce thereby frustrating the statute and the constitution which guaranty that Utah shall have equality of rights, privileges and sovereignty with those of the thirteen original states. It has declared this waterway which is clothed with a public interest to be subject to the private ownership and control of whoever may have title to the riparian land.

ARGUMENT

The tests of navigability are the same whether the question to be determined is the power of the government to control commerce on interstate rivers or the power of a state to control rivers within the borders. See *United States v. Appalachian Electric Power Company, supra.* This is to be expected, since there is no conflict between the powers of these two sovereigns. While this Court has not adopted any single definitive test of navigability, the controlling inquiry is whether the natural condition of the river—that is, volume of water, regularity of flow, and grade of channel—is such that it can be used when the need arises for transporting property or persons in connection with some trade or commercial activity. In other words, is it capable of public utility?

> "The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." The Montello, 20 Wall. 430.

The capacity of the San Juan River in 1896 for transportation in trade or commerce is established, not only by its natural condition and by actual demonstration, but also by comparison with the portions of the Colorado and Green Rivers determined to be navigable in *United States v. Utah, supra,* and with the sector of the New River found to be navigable in *United States v. Appalachian Electric Power, supra.* The San Juan River flows through exactly the same kind of territory as the Colorado and the Green

and has all the natural conditions of those two rivers. The character and extent of use of all three at the time of Statehood is the same. There is also a close similarity in impediments to use of the rivers by boats. Admittedly, there is a greater volume of water in the Green and the Colorado, but this difference is of no controlling importance.

The New River is likewise strikingly similar to the San Juan even as to volume of water. If there is a difference between these two rivers with respect to navigability, it is that the San Juan was used more than was the particular section of the New in controversy in the *Appalachian* case. The demonstrations of navigability of the San Juan are far more conclusive than any performed on the New River.

The Master did not base his finding of nonnavigability of the San Juan below Chinle Creek upon any insufficiency of or variation in the stream flow. The precipitous walls of the long deep canyon through which it flowed immediately below Chinle Creek, the numerous rapids, some of them as high as 35 feet, the large protruding boulders in the bed, and the inaccessibility of the waterway, were the considerations upon which the Master based his conclusion of nonnavigability. He found the same insurmountable obstacles to navigation that existed in the Colorado River through Cataract Canyon.

Neither of the courts below based their conclusions of nonnavigability upon the physical conditions of the River. Undue weight was given to incidents and events which have occurred in the life of the River and to obstructions, inconveniences and impediments to navigation. Mistakes were made in several important instances with respect to what

the evidence established. Uncontradicted and controlling facts were overlooked or ignored.

Aside from these errors in the findings, "the standards and ultimate conclusions of navigability involve questions of law inseparable from the particular facts to which they are applied." *United States v. Appalachian Electric Power Company, supra.* To the same effect are: *United States v. Rio Grande Irrigation Company,* 174 U. S. 690, *Economy Light Company v. United States,* 256 U. S. 113, *United States v. Holt State Bank,* 270 U. S. 49, *United States v. Utah,* 283 U. S. 64.

An additional reason why this court should make its own appraisal of the evidence of navigability is that it has original jurisdiction coordinate with that of the District Court. The judicial functions of this Court should not be made to turn upon the choice of forum made by the government.

The State of Utah is not asserting its sovereignty as against that of the United States. The evidence indicates clearly that the San Juan River is an interstate navigable stream. The Government has control over navigation on such rivers and the sovereignty of the State is subordinate to that control. By asserting the River to be nonnavigable and obtaining a decree to that effect, the Government precludes itself forever from exercising any sovereignty or control over the River. The public usefulness of this water course can be preserved only by adjudging the ownership and control of it to be in the State of Utah.

It is respectfully submitted that this Petition for a Writ of Certiorori should be granted.

Dated July 10, 1962.

RONALD N. BOYCE,
Assistant Attorney General of Utah
State Capitol Building
Salt Lake City, Utah
GRANT H. BAGLEY
65 South Main Street
Salt Lake City 11, Utah
Counsel for Petitioners

DENNIS MCCARTHY
CLIFFORD L. ASHTON
DONALD E. SCHWINN
65 South Main Street
Salt Lake City 11, Utah
Of Counsel